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In the Supreme Court of the United States

OCTOBER TERM, 1993

PIPER AIRCRAFT CORPORATION

v. *Petitioner,*

EDWARD CHARLES CLEVELAND,
by and through the Conservator
of his Estate, Kathleen Cleveland,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

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Petitioner Piper Aircraft Corporation's ("Piper") Petition for a Writ of Certiorari ("Petition"), together with the supporting briefs of amicus curiae Aircraft Owners and Pilots Association, and amici curiae Aerospace Industries Association of America, Inc., and General Aviation Manufacturers Association, demonstrate the importance of the issue presented to all segments of this nation's aviation community and the necessity of review by this Court.

Respondent Edward Cleveland's Opposition to Petition for Writ of Certiorari ("Opp.") ignores the importance of this issue and the substantial errors of the court below. Rather, Cleveland misstates the facts[1] and attacks stawmen.

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[1] Cleveland misrepresents the facts in claiming that Piper "required" Super Cub owners to retrofit their aircraft with rear seat shoulder harnesses. Opp. at 2-3. Piper does not have the power to require retrofitting of aircraft owned by others; only the FAA has that power,

I. SECTION 105 OF THE AIRLINE DEREGULATION ACT OF 1978 DOES NOT NEGATE IMPLIED PREEMPTION IN THE FIELD OF AIRCRAFT DESIGN STANDARDS

Contrary to Cleveland's implication, *see* Opp. at 4-5, Piper has never contended that Cleveland's two state common law design negligence claims are expressly preempted by section 105 of the Airline Deregulation Act of 1978 ("1978 Act"), 49 U.S.C. App. § 1305 (1988), which preempts state laws "relating to rates, routes, or services" of commercial airlines. Piper's position is that Cleveland's claims are preempted because the text, purpose, and history of the Federal Aviation Act of 1958 ("1958 Act") and the federal regulations promulgated thereunder clearly demonstrate Congress' intent that federal law occupy the field of aircraft design standards, and because Cleveland's claims

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and the FAA considered and rejected such a requirement. *See* Petition at 11, 23. The specified purpose of the Piper Service Letter referred to by Cleveland was only "[t]o notify owners and operators of Piper Airplanes of the availability of required material and instructions for the installation of an approved shoulder harness at each seat location in all Piper airplanes." Piper Super Cub owners already knew from their owners' handbooks that shoulder harnesses were available for both seats.

Cleveland also misstates the facts by suggesting that FAA regulation is inapplicable to this case because the accident occurred on "Uncontrolled Private Ground," and "not in federal airspace." Opp. at 2. FAA regulations governed the design of the Super Cub, Cleveland's modification of the aircraft and his initiated flight. The FAA imposed sanctions on both Cleveland and Mr. Mudd, the mechanic, for their unauthorized modification of the Super Cub. The 1958 Act defines the term "special aircraft jurisdiction of the United State" to include any aircraft within the United States "while that aircraft is in flight, which is from the moment when all external doors are closed following embarkation until the moment when one such door is opened for disembarkation," 49 U.S.C. App. § 1301(38)(1988), and the term "navigable airspace" to include "airspace needed to insure safety in take-off and landing of aircraft." *Id.* § 1301(29).

conflict with design decisions of the Federal Aviation Administration ("FAA").[2]

The express preemption provision in section 105 is relevant here only because the court below, misreading *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992), held that the enactment of section 105 in 1978 negates any implied preemptive effect in all other areas of aviation governed by the 1958 Act.[3] This holding seriously undermines Congress' intent that there be uniform national aircraft design standards promulgated by one expert federal agency, the FAA. The decision below also suggests that this Court's holding in *Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973) (state and local regulation of aircraft noise impliedly preempted) is no longer good law after the enactment of section 105; that the holding of the Seventh Circuit in *Bieneman v. City of Chicago*, 864 F.2d 463, 472-73 (7th Cir. 1988) (state tort damage claims for aircraft noise resulting from conduct and aircraft designs approved by federal regulations impliedly preempted), *cert denied*, 490 U.S. 1080 (1989) was wrong; and states that the holding of the First Circuit in *French v. Pan Am Express, Inc.*, 869 F.2d 1 (1st Cir. 1989) (state law

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[2] Cleveland's Opposition makes clear that his claims directly challenge the considered judgment of the FAA and its predecessors that the Piper Super Cub's tandem seat, tailwheel design and rear seat operation are safe, and that installation of a rear seat shoulder harness should be at the discretion of the owner. *See* Opp. at 2-3.

[3] Cleveland's repeated citation of *Morales v. Trans World Airlines, Inc.*, 112 S.Ct. 2031 (1992) – a case that only construes, broadly, the express preemption provision of section 105 – is mystifying. The only conceivable relevance of *Morales* to the implied preemption issue here is the Court's passing comment that prior to the 1978 Act, the States could enforce their deceptive advertising laws against airlines. This, however, says nothing about congressional intent in the area of aircraft design. The express preemption provision of section 105 was needed in the 1978 Act because regulation of deceptive advertising and intrastate air carrier rates were areas within traditional state police power. Regulation of aircraft design has never been such an area. *See* Petition at 3-9.

governing employee drug testing impliedly preempted by FAA regulation of pilot qualifications) was "mistaken." App. 11a.[4]

The Tenth Circuit's reliance on section 105 and *Cipollone's* "expressio unius" presumption to reach these seriously erroneous results was clearly misplaced. In the two federal cigarette labeling acts at issue in *Cipollone*, the preemptive language was enacted simultaneously with and was an integral part of the legislations' substantive provisions. Here, the preemptive language of the 1978 Act's section 105 was enacted twenty years after the substantive provisions of the 1958 Act whose preemptive effect is at issue. As *Cipollone* itself reminds us, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." 112 S.Ct. at 2619 (quoting *United States v. Price*, 361 U.S. 304, 313 (1960). That is all the more true where the subsequent Congress in 1978 was addressing a very different area -- commercial airline economic regulation -- administered by a different federal agency -- the Civil Aeronautics Board. *See generally Morales*, 112 S.Ct. at 2034.

Section 105 of the 1978 Act is not a "reliable indicium of congressional intent with respect to state authority," *Cipollone*, 112 S.Ct. at 2618, in the area of aircraft design standards regulated by the FAA. Here the reliable indicia of congressional intent are (1) the comprehensive structure of the federal regulatory scheme, (2) the legislative history of the 1958 Act and in particular the clear statements that "one agency, and one agency alone" is to have "plenary authority" to set uniform, national aircraft design standards, H.R. Rep. No. 2360, 85th Cong., 2d Sess., 1-2, 22 (1958) *reprinted* in 1958 U.S.C.C.A.N. 3741, 3741-42, 3761, and (3) the recognition of the States, themselves, of congressional intent and the need for uniform federal aircraft design standards. *See* Petition at 4-6.

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[4] The decision below thus creates a conflict among the circuits as to whether the 1958 Act continues to have implied preemption effect after the enactment of section 105 of the 1978 Act.

II. THE SAVINGS CLAUSE DOES NOT PERMIT STATE LAW TO ESTABLISH SUBSTANTIVE AIRCRAFT DESIGN STANDARDS

Cleveland attacks another strawman contending that Piper seeks to abolish all compensation for "aircraft accident victims" by preempting state tort remedies. Opp. at 5, 7. The preemption required here is not of all tort remedies, but only state law claims that an aircraft design expressly considered and approved by the FAA was nevertheless negligent. State law may provide a remedy, preserved from preemption by the savings clause in 49 U.S.C. App. § 1506 (1988), against a manufacturer for failure to comply with federal design standards. *See Bieneman*, 864 F.2d at 471-73; *cf. Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) (state law punitive damage remedy available for violation of federal nuclear safety requirements). However, the savings clause in the 1958 Act does not preserve state law claims which would impose liability on aircraft manufacturers for utilizing aircraft designs determined by the FAA to be safe and in full compliance with all applicable federal aircraft standards. *See* Brief for the United States as Amicus Curiae, *Cleveland v. Piper Aircraft Corp.*, No. 91-2065 (10th Cir.), at 20. The contrary decision below, which endorses such claims, should be reviewed by this Court because it seriously interferes with this important federal regulatory scheme and is of vital interest to our nation's aviation community.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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